

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-4184

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-4184

ARTHUR and SUSAN CROSSLAND,
Appellants,

-against-

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

APPEAL FROM THE UNITED STATES TAX COURT

BRIEF FOR APPELLANTS

MICHAEL H. SIMONSON
Attorney for Appellants
350 Park Avenue
New York, New York 10022

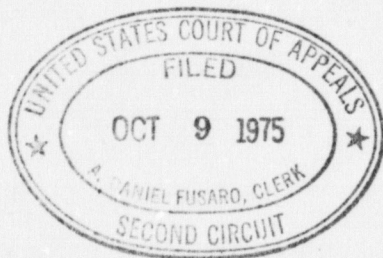


TABLE OF CONTENTS

	<u>Page</u>
Statute Involved	2
Issues Presented for Review	3
Statement of the Case	3
Nature of the Case	3
Proceedings and Disposition Below	4
Statement of Facts	5
Summary of Argument	10
ARGUMENT:	
I. Taxpayer Had a "Home" in Pennsylvania During all of 1968	10
A. Taxpayer's "Home" was in Windsor until he removed his belongings in early 1968	11
B. When Taxpayer removed his belongings from Windsor to Shamokin, he estab- lished his "home" in Shamokin for tax purposes	12
II. The Tax Court Incorrectly Applied A Standard Requiring That, While Traveling In Vermont, Taxpayer Also Incur "Duplicate" Expenses to Maintain His Pennsylvania "Home"	14
III. Taxpayer Did Incur "Duplicate" Expenses To Maintain His Pennsylvania "Home"	17
IV. Alternatively, Taxpayer Had A "Home" In Pennsylvania During At Least Part of 1968	17
Conclusion	18

CITATIONS

Cases

<u>Commissioner v. Flowers</u> , 326 U.S. 465 (1946)	12, 14, 15
<u>James v. United States</u> , 176 F. Supp. 270 (D.C. Nev. 1959), aff'd, 308 F.2d 204 (9th Cir. 1962)	12, 15, 16
<u>Rosenspan v. United States</u> , 438 F.2d 905 (2d Cir. 1971), cert. denied, 404 U.S. 864 (1971)	12, 13, 16
<u>Six v. United States</u> , 438 F.2d 66 (2d Cir. 1971)	12

Statutes and Regulations

Internal Revenue Code of 1954	
Section 162(a)(2)	2, 3, 4, 12, 16
Section 7482(b)(2)	2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-4184

ARTHUR and SUSAN CROSSLAND,
Appellants,

-against-

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

APPEAL FROM THE UNITED STATES TAX COURT

BRIEF FOR APPELLANTS

This is an appeal from a decision entered in the United States Tax Court (Hall, J.) on February 3, 1975. Because the appeal relates solely to matters comprised by Tax Court Docket No. 2431-72, the only taxpayer interested in this appeal is Arthur J. Crossland ("Taxpayer"). The opinion of Judge Hall, which was entered on October 24, 1974, is reported at 33 T.C.M. 1278 (1974).

By order dated September 3, 1975 (Mulligan, Oakes and Gurfein, Circuit Judges), Taxpayer was granted leave to proceed in forma pauperis and to have assigned counsel.

Although Taxpayer resided in New Hampshire when his Petition to the Tax Court was filed (Stip., p.1), he now resides in Hicksville, New York. Pursuant to Section 7482(b)(2) of the Internal Revenue Code of 1954, as amended, 26 U.S.C.(the "Code"), the parties have agreed that this appeal be reviewed by the United States Court of Appeals for the Second Circuit, and a written stipulation to that effect will be filed.

STATUTE INVOLVED

Section 162(a) of the Code provides in pertinent part as follows:

(a) In General.- There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including-

* * *

(2) Traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business....

ISSUES PRESENTED FOR REVIEW

I. Whether the Taxpayer had a "home" in Pennsylvania during all or part of 1968, and is therefore entitled to a deduction under Section 162(a)(2) of the Code for all or part of the traveling expenses he incurred while pursuing a trade or business in Vermont.

II. Whether a taxpayer must incur "duplicate living expenses" in order to be entitled to a traveling expense deduction.

STATEMENT OF THE CASE

Nature of the Case

This appeal questions the standards to be applied in deciding whether certain expenses incurred by a technical writer temporarily employed in Vermont are deductible as traveling expenses incurred while "away from home" in the pursuit of a trade or business, within the meaning of Section 162(a)(2) of the Code. The case involves a single mixed question of fact and law- whether the Taxpayer had a "home" in Pennsylvania during all or part of 1968 while he was temporarily at work in Vermont. In determining this ultimate fact, the Tax Court applied two erroneous

standards, only one of which is relevant to this appeal:¹
that a taxpayer must incur living expenses at each of two
places of abode.

Regardless of the standards now applied on review,
the Taxpayer appeals as well from the determination that
he had no "home" in Pennsylvania during the period in question.

Proceedings and Disposition Below

On his Federal income tax return for 1968,
Taxpayer claimed a \$5,630.55 deduction for the cost of food,
lodging, automobile depreciation, and "trips to [his]
permanent residence [while] between jobs." The Commissioner
of Internal Revenue ("Commissioner") disallowed this
deduction (and certain other deductions no longer at issue),
and Taxpayer petitioned the Tax Court for a redetermination
of the deficiencies assessed by the Commissioner.

The Tax Court disallowed in its entirety the
deduction claimed by Taxpayer in 1968, determining that
Taxpayer "had no regular place of abode in a real and
substantial sense" and that his home for tax purposes was
therefore "wherever he happened to be working". 33 T.C.M.
at p. 1281. In making that determination, it appears that

1

Because the Tax Court found that Taxpayer's jobs in Vermont
during 1968 were "temporary", 33 T.C.M. at p. 1281, Taxpayer
has not been harmed by the Court's reiteration of its consistently
held position that, for purposes of Section 162(a)(2) of the Code,
a taxpayer's "home" is his principal place of employment.

the Tax Court gave undue weight to its implied conclusion that Taxpayer did not incur significant expenses in maintaining a "home" in Pennsylvania. Ibid. It is not clear from the record whether Taxpayer has substantiated all of the business expenses comprised by the deduction in question. (See Transcript, 2/4/74, pp. 50, 53-57, and 33 T.C.M. at p. 1280).

Taxpayer proceeded pro se in the Tax Court, where he brought in "a suitcase full of documents... that nobody's seen before". (Transcript, 2/5/74. p. 4)². Very few facts were stipulated in advance by the parties; proposed findings of fact were only solicited from and prepared by the Commissioner (Tr. 101); and the facts found by the Tax Court weigh more heavily against Taxpayer's position than is merited by the record.

Statement of Facts

During the period relevant to this appeal, Taxpayer was a technical writer specializing in the field of electronics (Tr. 16). Through various "job shops", he was supplied under purchase orders to companies needing his special skills for a temporary period, usually to staff a Government-sponsored project (Tr. 17). Taxpayer was listed

² All subsequent references to pages of the transcript ("Tr") will refer to the proceedings on February 4, 1974, at which time both counsel for the Commissioner and the Taxpayer were present.

with a number of such "job shops" (Tr. 12-13).

From November 13, 1967 to May 17, 1968, Taxpayer worked under contract with International Business Machines ("IBM") in Essex Junction, Vermont (Stip., p. 2; Tr. 22). From May 23, 1968 to March 14, 1969, Taxpayer worked under contract with General Electric ("G.E.") in Burlington, Vermont (Stip., p. 2; Tr. 24-25). It could be seen in each case that Taxpayer's jobs were of the type that could only last for a short period, and the Tax Court found that they were "temporary" (33 T.C.M. at pp. 1280-1281).

In 1955, Taxpayer purchased a house in Windsor, Pennsylvania, where he lived with his wife and children (Tr. 44). In 1967, Taxpayer invested approximately \$3,000.00 in refurnishing and remodeling his Windsor residence (Tr. 43). Taxpayer had no intention of staying in Vermont (Tr. 23, 97). He planned to earn enough money "job shopping" to pay off his furniture bills and return to Windsor where he hoped to do free lance writing or, if necessary, drive "a wheelbarrow or something" (Tr. 44). He was aware that there was no demand for his technical writing skills in the area of his home (Tr. 95).

When Taxpayer left for the IBM job in November, 1967, he faced the prospect of estrangement from his wife, who had threatened to divorce him if he left and "went job

shopping" (Tr. 93). Shortly after his departure, his wife informed him that she indeed wanted a divorce (Tr. 92). In early 1968, Taxpayer moved his personal belongings from the Windsor residence to his mother's home in Shamokin, Pennsylvania (Tr. 94). From that point on, Taxpayer no longer considered Windsor his home (Tr. 92); when the IBM contract terminated in May, 1968, Taxpayer "severed all ties with Vermont" and "went home" to Shamokin (Tr. 96).

Taxpayer was divorced from his wife on October 2, 1968 (Stip., p. 3). She retained the residence in Windsor, where she continued to live with their children (Stip., p. 3).

While working with IBM, Taxpayer stayed in a motel in Essex Junction (Tr. 24). When Taxpayer returned to Vermont in May, 1968, to work for G.E., he found an apartment in Burlington (Tr. 25, 36). In August, 1968, Taxpayer bought a 26-foot travel trailer and vacated the apartment (Tr. 35-36). Thereafter, Taxpayer would stay in his travel trailer whenever he was "away from Shamokin", eventually selling the trailer sometime in 1971 (Tr. 36).

Each time that Taxpayer went on the road for a temporary job, he took only those things that he needed for the period of time he expected to be gone (Tr. 34). When he moved his "effects" from Windsor to Shamokin, they included his files, books, records, clothing, and his second car (Tr. 34-35).

After Taxpayer's estrangement from his wife, the home in Shamokin also became his "business headquarters"- the place where "job shops" knew to contact him (Tr. 94). His mother was always there to receive telephone calls (Tr. 94). When his job with IBM was terminated on May 17, 1968, he returned "home" to Shamokin to "make his usual contacts" (Tr. 23). During the week that followed, he was contacted there and told of the opening for an electronics technical writer with G.E. in Burlington (Tr. 24).

Taxpayer testified that he would visit Shamokin to "break" his residency in Vermont, "go home", and attend to other details, but that he didn't know "what the order of priority was" (Tr. 57). Taxpayer maintained a Pennsylvania driver's license (Tr. 57). In certificates³ given to Northern Industrial Services, Inc. and to G.E., dated November 14, 1967 and July 11, 1968, respectively,

³ The certificates were required by "job shops" or by contracting parties, such as G.E., to substantiate the fact that a temporary employee was maintaining a permanent residence some distance from the job site (Tr. 38-39). Those providing a certificate were entitled to per diem allowances (Tr. 39). In April 1970, G.E.'s audit staff questioned the Taxpayer's right to per diem allowances and required him to submit objective evidence showing that he had a permanent residence in Shamokin (Tr. 40; see Ex. F to Taxpayer's "Brief on Motion to Dismiss", dated 2/25/73). Although some "job shoppers" were required to pay back their per diem allowances to G.E. (Tr. 41), Taxpayer was able to satisfy the G.E. auditors (Tr. 42). Unfortunately, Taxpayer's "objective evidence" of his Shamokin residency has not been made part of the record in this case.

Taxpayer listed the Windsor address as his permanent place of residence; beginning with a certificate dated August 23, 1968, also given to G.E., Taxpayer thereafter consistently listed his Shamokin address on such certificates as his permanent residence (Ex. D to Taxpayer's "Brief on Motion to Dismiss", dated 2/25/73).

Beginning no later than May 17, 1968, when his employment with IBM was terminated, Taxpayer considered Shamokin to be his home (Tr. 23). Taxpayer continued to view Shamokin as his home until, remarried, he returned to Vermont in November 1971 and moved into a mobile home (Tr. 36, 45-46).

Pursuant to an installment agreement dated July 9, 1966 (Taxpayer's Ex. 9), Taxpayer agreed to acquire for \$2,000 a one-half interest in the Shamokin home then owned by his mother; Taxpayer was required to pay \$200 down and the balance to his mother, without interest, in 45 consecutive monthly installments of \$40 each (Tr. 27, 29, 67). Taxpayer continued to make monthly payments to his mother during a period extending beyond 1968 (Tr. 34). Section 7 of that agreement required Taxpayer and his mother to share the expense for maintenance and repairs to the premises. To the extent possible, Taxpayer helped pay for the upkeep of the Shamokin home by paying taxes and sending money to his mother that was intended to cover some of the costs of running the house (Tr. 81).

SUMMARY OF ARGUMENT

In deciding that Taxpayer was an "itinerant worker" with no "home" at all, the Tax Court applied an improper standard requiring a taxpayer to incur "duplicate" living expenses. As a consequence, the Tax Court went astray in reaching its ultimate factual conclusion.

Apart from that legal issue, the Tax Court's finding that Taxpayer had no "home" in Pennsylvania during all or any part of 1968 was clearly erroneous; Taxpayer was decidedly not an itinerant. Taxpayer will argue that he had a "home" in Pennsylvania during the entire year. Alternatively, Taxpayer will contend that he had a "home" in Pennsylvania during at least part of the year.

Finally, Taxpayer will argue that he did incur "duplicate" expenses and that the Tax Court's factual determination was therefore clearly erroneous even if it was proper for the Tax Court to impose a "duplication" test.

ARGUMENT

I.

TAXPAYER HAD A "HOME" IN
PENNSYLVANIA DURING ALL OF 1968

No matter what tests are applied, Taxpayer had a home in Pennsylvania during all of 1968. During that

year, he shifted his "home" from Windsor to Shamokin.

A. TAXPAYER'S "HOME" WAS IN WINDSOR
UNTIL HE REMOVED HIS BELONGINGS
IN EARLY 1968

Although the Tax Court concluded that Taxpayer was an itinerant during 1968, its opinion carries a strong implication that the Tax Court considered Taxpayer to have been homeless during the entire 1957 to 1972 employment period that it reviewed. The record in this case refutes both that implication and the Tax Court's finding as to 1968.

In 1955 Taxpayer acquired a home in Windsor where he lived with his wife and his children (Tr. 44). Despite Taxpayer's career as a "job shopper," he always had a family home to return to, with all the attendant benefits and obligations of home ownership. He undertook substantial home improvements in 1967 (Tr. 43), and in 1968 he was still making the mortgage payments (Tr. 92) and paying for furniture (Tr. 93). If Taxpayer did become "homeless" during 1968, it was for the very first time. The record clearly indicates that Taxpayer had a "home" in Windsor before 1968, with enough "duplicate" expenses to require his "job shopping" until the bills were paid off (Tr. 44). Taxpayer did not abandon that residence until he removed his belongings from Windsor to Shamokin in early 1968 (Tr. 94).

B. WHEN TAXPAYER REMOVED HIS BELONGINGS
FROM WINDSOR TO SHAMOKIN, HE ESTAB-
LISHED HIS "HOME" IN SHAMOKIN FOR
TAX PURPOSES

When he learned in early 1968 of his wife's intention to seek a divorce (Tr. 92), Taxpayer moved his belongings to his mother's home in Shamokin (Tr. 94). Upon his separation from his wife, Shamokin became his home (Tr. 23).

When used in Section 162(a)(2), "home" means the taxpayer's "permanent abode or residence," Six v. United States, 450 F.2d 66, 69 (2 Cir. 1971); Rosenspan v. United States, 438 F.2d 905 (2 Cir. 1971), cert. denied, 404 U.S. 864 (1971); his "home in everyday parlance," and has no "twisted meaning" peculiar to the Internal Revenue Code. Commissioner v. Flowers, 326 U.S. 465, 474 (1946) (Rutledge, J., dissenting). A more elaborate definition was given by the District Court in James v. United States, 176 F. Supp. 270, 273 (D.C. Nev. 1959), aff'd, 308 F.2d 204 (9 Cir. 1962);

"Whereas intent is often determinative in establishing domicile, a 'home' rests upon something more objective than intent. There must be a corpus as well as an animus manendi. It is a relationship that a person bears to a given locality evidenced by certain objective and outward manifestations. It is a place of abode in a particular locality, one's 'castle', whether it be a hotel room or a mansion, in and about which one centers his personal 'off-work' activities."

Taxpayer hated Vermont and had always intended to return to Pennsylvania and settle down more permanently (Tr. 23, 44, 97). His repeated testimony that he considered Shamokin to be his permanent abode, at least until 1971 (Tr. 45-46), distinguishes this case from Rosenspan, supra, where the taxpayer failed to assert that he had any permanent abode at all.

More importantly, the record discloses a number of objective indications that Taxpayer had a permanent residence in Shamokin. He entered into an executory contract to acquire a one-half interest in his mother's home there (Taxpayer's Ex. 9). At his earliest opportunity, he removed his belongings from Windsor and took them there, including the files and records so important to a "job shopper," some clothes, and his second car (Tr. 34-35). When he returned to Vermont for the job with GE, he took only what he needed for the term of his new contract (Tr. 34). The furniture at Windsor remained with his wife (Tr. 35). In addition, the Shamokin home became Taxpayer's business headquarters, the place where "job shops" could always call him or write him concerning job openings (Tr. 94). Taxpayer also had a Pennsylvania driver's license (Tr. 57).

II

THE TAX COURT INCORRECTLY APPLIED A STANDARD REQUIRING THAT, WHILE TRAVELING IN VERMONT, TAXPAYER ALSO INCUR "DUPLICATE" EXPENSES TO MAINTAIN HIS PENNSYLVANIA "HOME".

The Tax Court's requirement that a taxpayer incur living expenses both at the place of his temporary employment and at his alleged "home" adds an unnecessary embellishment to the three-part test set out in Commissioner v. Flowers, 326 U.S. 465 (1945). Although the Supreme Court did not define what a "home" is, it did provide clear guidelines for determining the deductibility of a traveling expense, 326 U.S. at 470:

"(1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.

(2) The expense must be incurred 'while away from home.'

(3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditures and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade."

The Supreme Court did not mention any need for a "duplication" of expenses. Significantly, the Court made no reference at all to a taxpayer's ties to his purported

"home"; each of the Flowers tests focuses instead upon the taxpayer's existence while on the road.

The "duplication" requirement was articulated most succinctly in James v. United States, 308 F.2d 204, 207 (9 Cir. 1962) (dictum)⁴:

"[E]xpenditures for meals and lodging can be said to arise from business necessity rather than personal need only to the extent that the taxpayer must pay more for these items as a result of travel for business purposes. And this increased burden can arise either from duplication or from inherently higher cost." Id. at 207.

The Court concluded that a taxpayer could not meet this test unless he incurs "substantial continuing living

4 In James, it was unnecessary for the court to deal with the duplication issue. It was evident that the taxpayer had no "home", in any sense of the word, but was constantly in a "travel status." While in his purported home town, the taxpayer stayed in hotels, ate his meals out, and behaved as he did in other large cities in his sales territory. The most plausible explanation for the James decision is that the Ninth Circuit was wrestling with the notion that the taxpayer might nonetheless be entitled to a traveling expense deduction. He did think of the town as his headquarters, and he there maintained his post office box and bank account, kept some personal belongings, and filed his tax returns. The court noted at the outset that "it is not self-evident that a taxpayer must have a home to be entitled to deduct living expenses under the Section." 308 F.2d at 205.

expenses at a permanent place of residence."⁵ Id. at 207-208.

Section 162(a)(2) was of course intended to alleviate the duplicate expenses incurred by a taxpayer who has to travel in his business, but it does not require that a taxpayer's traveling expense be duplicative. If a strict "duplication" test were employed, a young man starting out as a salesman and still living with his parents, would be denied a deduction for travel costs unless he contributed to the upkeep of their home. But the literal language of Section 162(a)(2) grants him a deduction for those costs. If a taxpayer has any "home" at all, in the sense of domicile, travel expenses will invariably present an incremental burden, and the statute recognizes this.

Assuming, arguendo, that the Taxpayer incurred no expenses of maintaining a residence in Windsor or Shamokin, he is still entitled to a traveling expense deduction. His home was in Pennsylvania; he was "away

5 The Second Circuit in Rosenspan made reference to the James rationale without endorsing its "duplication" test. The Court simply pointed out that the "away from home" test of the statute recognizes the "rational distinction between the taxpayer with a permanent residence - whose travel costs represent a duplication of expense or at least an incidence of expense which the existence of his permanent residence demonstrates he would not incur absent business compulsion - and the taxpayer without such a residence." 438 F.2d at 912.

from home;" and his expenses clearly met the other tests of Section 162(a)(2).

III

TAXPAYER DID INCUR "DUPLICATE" EXPENSES
TO MAINTAIN HIS PENNSYLVANIA "HOME".

The Tax Court erred in concluding that the Taxpayer did not incur any "duplicate" living expenses in 1968. In fact, the Taxpayer clearly contributed to the maintenance of two homes--first in Windsor and later in Shamokin.

When 1968 began, Taxpayer's home was still in Windsor, and he continued to make mortgage payments and to pay furniture bills even after he moved out (Tr. 92-93). After Taxpayer moved his belongings to Shamokin, he contributed to the cost of maintaining the house there (Tr. 34). Even if the payments to his mother were not appropriately "ear-marked" as home maintenance contributions, Taxpayer intended them as such. They must certainly suffice to meet any "duplication" requirement.

IV

ALTERNATIVELY, TAXPAYER HAD A "HOME"
IN PENNSYLVANIA DURING AT LEAST PART
OF 1968.

Taxpayer claims that he had a "home" in Pennsylvania at all times during 1968, though his "home"

did shift from Windsor to Shamokin. However, if it is concluded that his contacts with Shamokin were not sufficient to meet the requirements of Section 162(a)(2) until he returned to Shamokin on May 17, 1968, then Taxpayer should at least be entitled to the traveling expenses incurred both during the period that Windsor was still his "home," and during the period from May 17 to December 31, 1968. If Taxpayer never established the necessary relationship to Shamokin, he should at least be permitted to deduct the expenses incurred in the first part of the year.

CONCLUSION

The Tax Court's finding that Taxpayer had no regular place of abode in 1968, was clearly erroneous. Moreover, that finding resulted from the Tax Court's application of an improper standard requiring "duplication" of living expenses. During 1968, Taxpayer moved from one permanent abode in Windsor to a second in Shamokin, and he incurred expenses during 1968 to maintain each.

The decision of the Tax Court should be reversed and Taxpayer permitted a deduction for the travel expenses claimed on his return.

Respectfully submitted,
Michael H. Simonson
MICHAEL H. SIMONSON
Attorney for Appellant
350 Park Avenue
New York, New York 10022
(212) 483-9000

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

MARIE MULHALL , being duly
sworn, deposes and says:

I am over the age of eighteen (18) years and
am not a party to this action.

On the 9th day of October , 1975, I served
a copy of the annexed paper upon

Scott P. Crampton, Esq.
Assistant Attorney General
Tax Division
Department of Justice
Washington, D.C. 20530

by depositing a true copy of the same in a properly
addressed postpaid wrapper in a regularly maintained
official depository under the exclusive care and custody
of the United States Post Office Department located in
the City, County and State of New York.

Marie Mulhall

Sworn to before me this
9th day of October , 1975.

Thomas P. Ryan.

THOMAS P. RYAN
NOTARY PUBLIC, STATE OF NEW YORK
No. 60-4603092
Qualified in Westchester County
Certificate Filed in New York County
Term Expires March 30, 1976

